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No. 04-604

Supreme Court, U.S.
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In The
Supreme Court of the United States

"THE PUBLIC ENTITIES," and/or "PROGRAMS OR ACTIVITIES," of CITY OF TUCSON, and the TUCSON POLICE DEPARTMENT (TPD), and its CHIEF SMITH, and CAPTAIN(S) LEVITT, DAYKIN, DANAHER, AND OTHER OFFICERS AND DETECTIVES LISTED AT "2A-2B", and MAYOR MILLER,

Petitioners,

v.

DENNIS DAVID McCULLEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

There is no dispute that this case rests on the applicability of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), and on Fed. R. Evid. 201 regarding the kinds of facts that can be judicially noticed. Certiorari should be granted because the Ninth Circuit's decisions clearly violated both and if allowed to stand will result in manifest injustice to Petitioners.

ARGUMENT IN REPLY

Respondent argues that the granting of his Rule 32 motion; the language of Arizona Revised Statute § 13-702(G), the sentencing statute; the county attorney guidelines for reducing a charge from a class 6 felony to a class one misdemeanor; and the language of Arizona Revised Statute § 13-907(B)(2), the statute for setting aside a judgment, all point to a 'favorable termination' of his underlying convictions. He also points to those sources, and the lower courts' reliance on them in their decisions, as proof of his alleged innocence of assaulting the police officers with a knife. Respondent's arguments evidence his confusion between his *original* criminal charges and convictions, for Aggravated Assault with a Deadly Weapon on a Police Officer, with his *ultimate* convictions, of the lesser included-offenses of Aggravated Assault on a Police Officer. It is only the ultimate convictions that are relevant to the issue of favorable termination.

A. The granting of the Rule 32 Motion was not a "favorable termination."

The Ninth Circuit Court of Appeals was incorrect in its ruling of February 12, 2004, wherein it stated that Respondent could go forward with his § 1983 claims because those claims could not have been brought until after the granting of his Rule 32 motion, which, according to the Ninth Circuit, was a successful termination of the underlying charges. Case law is clear that a favorable termination requires a showing of innocence. The Rule 32 order only established that Respondent's trial attorney provided ineffective assistance; it did nothing to establish McCulley was innocent of the charges. The charges remained pending after the Rule 32 hearing, and Respondent later pled to them, reduced through plea bargaining to lesser-included offenses.

B. The plea to lesser-included offenses did not result in a "favorable termination."

The lesser-included offenses did not include the element of a deadly or dangerous weapon, but simply a *reduction* of the initial charges is not a *termination* of the prior criminal proceedings in favor of the accused, as required by *Heck*. *See Kent v. Katz*, 146 F.Supp.2d 450, 461 (2001) (defendant entered a plea bargain wherein he pled no contest to a lesser included offense. The court, in dismissing the § 1983 claim due to no favorable termination, noted this "does nothing to establish his innocence as to the original [] charge. Rather [it] leaves open the question of [his] guilt or innocence on the [original] charge."); *Nuno v. County of San Bernardino*, 58 F.Supp.2d 1127, 1139 (1999) (a charge being dismissed pursuant to a plea bargain is not a favorable termination for purposes of

Heck); *Coakley v. Jaffe*, 49 F.Supp. 615 (1999) ("Since the dismissal was . . . ' the result of compromise to which the accused agreed,' it was not a favorable termination and plaintiff's malicious prosecution claims, both under § 1983, must be dismissed."). Allowing Respondent to plead to lesser-included offenses that did not include the element of use of a deadly weapon does not reflect an opinion by the prosecution that the original action lacked merit or that it would result in a decision in favor of Respondent. *See Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004). The plea bargaining process necessarily involves a reduction in the original charge, a reduction of the maximum sentence, or both, as an incentive to move criminal cases through the system. It is not a commentary on the validity or the legitimacy of the original charges.

C. Reduction of the convictions to misdemeanors did not result in a "favorable termination."

Respondent was sentenced pursuant, in part, to Arizona Revised Statute § 13-702(G). He claims that in order for the court to sentence him for misdemeanors, the judge necessarily had to make a finding that Respondent did not use or exhibit a deadly weapon or dangerous instrument. Respondent's conclusion clearly evidences a misunderstanding of the statute. Arizona Revised Statute § 13-702(G) states that if a person is *convicted* of any class-six felony, not involving the intentional or knowing infliction of serious injury or the discharge, use or threatened exhibition of a deadly weapon or dangerous instrument, the court may consider reduction of the charge to a class one misdemeanor. (Page 3, Brief in Opposition). Respondent's convictions were

two counts of class-six felony aggravated assault. They were class six felonies because the element of use or exhibition of a deadly weapon or dangerous instrument had been withdrawn as part of the plea bargain. Those are the convictions that were reduced, at sentencing, to misdemeanors. Those are the convictions to which A.R.S. § 13-702(G) refers.

The Setting Aside of Judgment pursuant to Arizona Revised Statute § 13-907 was not a termination in Respondent's favor. Respondent misunderstands the statute. He points to the language of § 13-907(B)(2), which states that a person *convicted* of a criminal offense involving the use or exhibition of a deadly weapon or dangerous instrument cannot have the judgment set aside (emphasis added), as evidence that the trial court necessarily made factual findings that he was "completely innocent of the original charge" (Aggravated Assault with a Dangerous Weapon), because the judge could not have set aside the judgment of conviction if there had been use or exhibition of a deadly weapon. The convictions that were set aside were two counts of Aggravated Assault on a Peace Officer. There was no element of the use or exhibition of a dangerous or deadly weapon because that element had been dropped during the plea bargain.

D. The Ninth Circuit's Order granting the motion for judicial notice is plain error and seriously affects the fairness, public reputation, and integrity of judicial proceedings and results in manifest injustice to Petitioners.

The reason Petitioners did not file a response to the Motion for Judicial Notice, filed by Respondent with the Ninth Circuit Court of Appeals, is set forth in the Petition

for Certiorari at page nine. If this Court determines that Petitioners had a duty to respond by filing an opposition with the Ninth Circuit, Petitioners assert that this Court nonetheless has jurisdiction to decide the issue on the basis of plain error which seriously affects the fairness, public reputation, and integrity of judicial proceedings and which results in manifest injustice. *Delgado v. Reef Resort Ltd.*, 364 F.3d 642, 646 (5th Cir. 2004); *Retail Flooring Dealers of America, Inc. v. Beaulieu of America*, LLC, 339 F.3d 1146, 1150, n.5 (9th Cir. 2003); *Guides, Ltd. v. Yarmouth Group Property Management*, 295 F.3d 1065, 1075 (10th Cir. 2002); *U.S. v. Chavez-Marquez*, 66 F.3d 259, 261 (10th Cir. 1995). The Ninth Circuit's order stated simply, "McCulley's motion for judicial notice is granted." Included in the motion, among many other things, was the request to take judicial notice "that McCulley did not charge the two officers with a deadly weapon, to wit: a knife." Respondent could point to nothing in the record as proof of this assertion, except his interpretations of the decisions made by the judge in the underlying criminal case.

The Ninth Circuits' Order granting the motion for judicial notice is a glaring mistake on its face.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, Certiorari should be granted.

Respectfully submitted this 7th day of December, 2004.

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